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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214578
Party	Plaintiff LeMans Corporation
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Attachments	Response to Applicant's Motion to Dismiss.pdf(1184892 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LeMans Corporation, Opposer, v. Lemar Xavier Lewis, Applicant.	)))))))))	Opposition No. 91214578 Mark: THORO Serial No. 85/956,925

RESPONSE TO APPLICANT'S MOTION TO DISMISS

On July 8, 2015, Applicant filed a paper entitled Motion to Dismiss "Pre-Existing Registered Trademark/Trademark Bullying." This is a frivolous motion filed only to further delay Applicant's having to respond to the outstanding discovery requests of Opposer. It should be denied out of hand by the Board.

Background

Applicant is acting *pro se*. Applicant has been advised in Orders of the Board no less than four (4) times that Applicant will be required to strictly comply with the rules governing this proceeding (see Board Orders of June 18, 2014, September 3, 2014, October 17, 2014 and March 4, 2015). Given the Applicant's tactics of delay in this proceeding, leniency is not appropriate.

Applicant was required by the Board's Order of April 16, 2015 to provide Opposer with written, verified interrogatory responses without objections, and responses to document requests, with documents and without objections. This Order related to discovery served on Applicant

April 24, 2014. Responses provided by Applicant on May 5, 2015 did not fully comply with the Board's Order, and Opposer wrote to Applicant on June 10, 2015 detailing the insufficiencies and asking for complying responses by June 30, 2015. Opposer received no responses, let alone complying responses, from Applicant on June 30, 2015 (and still hasn't). Opposer also served by email, as agreed by the parties, its Second Set of Interrogatories and Document Requests, and First Set of Requests for Admission on June 10, 2015, making July 10, 2015 the deadline for Applicant to serve his responses by email. This Motion to Dismiss was filed two days before Applicant's response deadline on the Opposer's Second Set of Discovery Requests, thereby invoking the proscriptions of Trademark Rule 2.127(d). We believe this is the primary reason the fashioned "Motion to Dismiss" was filed.

Today, prior to signing and filing this Response, Opposer checked the TTAB database and found that Applicant has filed a "Motion for Extension" of the time to respond to Opposer's second set of discovery requests – on Friday, July 10, 2015. It should be noted that Applicant's motion has no Certificate of Service and, in fact, Opposer has not been served by Applicant with this motion.

The Basis for the Motion is Unstated

Applicant has not identified the rule basis (Federal Rules of Civil Procedure ("F.R.C.P.") or Trademark Rules of Practice ("TRP")) for his Motion to Dismiss.

Since an Answer was filed back in March of 2014, this cannot be a timely motion under Rule 12(b), F.R.C.P.

If this is, in effect, a motion for a judgment on the pleadings, under Rule 12(c), F.R.C.P., such a motion is a test solely of all undisputed facts appearing in all the pleadings (Notice of Opposition and Answer, with Affirmative Defenses). All well-pleaded factual allegations of Opposer, as the non-moving party, must be accepted as true, and the allegations in the Applicant's Affirmative Defenses, which did not require a responsive pleading, must be taken as denied. Further, all reasonable inferences from the pleadings must be drawn in Opposer's favor. See Section 504.02, Trademark Trial and Appeal Board Manual of Procedure ("TBMP"). Not only has Applicant not identified facts deemed admitted that would arguably entitle him to a judgment as a matter of law, he cannot assert there is no genuine issue of material fact to be resolved (to say the least, on the similarity of the THOR and THORO marks). Consequently, if this is a Rule 12(c) motion, it must be denied.

As there are no facts or materials provided from outside the scope of the pleadings which are properly supported by affidavit or the like, this is not a situation where the Board should treat the motion as one for summary judgment. **However, if the Board concludes there is something in Applicant's Motion to Dismiss that would justify treating it as a motion for summary judgment, the Opposer requests the Board to so notify the parties and to permit Opposer to have a reasonable opportunity to present all material made pertinent to such a motion by Rule 56, F.R.C.P. See Section 504.03, TBMP.**

Finally, as this Motion to Dismiss has not been captioned as a motion for summary judgment, and has not been supported in the manner required by Rule 56, F.R.C.P., either with admissible evidence or alleged admissible evidence, nor with an identification of the facts that cannot be disputed or genuinely disputed, it should be denied as a summary judgment motion.

There are no factual allegations made by Applicant to support the alleged bullying experienced by Applicant, such that Opposer can address them and disprove them (other than, possibly, the allegation Opposer has been abusive in discovery by asking questions about Applicant's registered, stylized "thoro" mark, which allegation will be addressed below). There is only argument and general, albeit incorrect, suppositions made by Applicant. Opposer expressly denies it has engaged in any bullying tactics with Applicant. Applicant simply doesn't like the opposition procedure and the requirements placed on an applicant in an opposition.

The Morehouse Defense raised by Applicant will be discussed briefly below, but since Applicant has not supported this claim by properly submitting and verifying his previous Registration No. 3,206,498, he has not made this defense proper subject matter for a summary judgment.

The Morehouse Defense

Even if Applicant had properly raised this defense for purposes of a summary judgment, there would be a genuine dispute as to the applicability of the defense.

The defense requires the marks and the goods of the previous registration and opposed application to be "substantially identical" or "essentially identical" depending on the case authority. These requirements do not exist here.

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The marks of the two filings of Applicant are:

Registration No. 3,206,498	App. Ser. No. 85/956,925
	THORO
Clothing namely T-shirts; tank tops, polo shirts, hats, undershirts, jerseys	Athletic shorts; baseball caps and hats; T-shirts

The commercial impressions of the marks are distinctly different. The stylization of the registered mark, with the lines over the "o"s, give the impression of a pair of glasses or of eyes and eyelashes. Telling is the fact that the Applicant, in his argument to overcome a Section 2(d) refusal of the registered mark based on a prior mark THORO-GARD (where the Examiner had said the "THORO" element was dominant in both marks), stated "... the applicants (sic) mark is a design and in a stylized form, with features (the lines over the o's and the "T" passing through the "h" in cursive style format) that the applicant feels would completely visibly separate the two marks "dominating" similarities." Applicant shouldn't have it both ways.

The covered goods are also not "substantially identical" for purposes of the Morehouse Defense. The goods of the pending, opposed application specifically bring the described products into the "athletic wear" province, which was not the case for the Applicant's registered mark. As the Board will know, from Opposer's registrations already in evidence in this case, Opposer's coverage in Class 25 is for motorcycle racing apparel – an athletic focus.

Consequently, the Morehouse Defense should not apply, but most assuredly should not be the basis for a summary judgment in favor of Applicant.

Allegation of Abusive Discovery

In section 3 of Applicant's Motion to Dismiss, he argues that Opposer is abusing and "far-overreaching" in requesting discovery on Applicant's stylized "thoro" mark registered under Reg. No. 3,206,498. However, such discovery is entirely proper given that Applicant raised this mark and registration in his Answer as an Affirmative Defense (see paragraphs 2 and 3 of the Affirmative Defenses). This discovery is hardly abusive, much less reflective of bullying.

More importantly, if Applicant had an issue with the scope of certain discovery requests, the appropriate course of action would have been to file a motion for a protective order from the Board for what he considered improper discovery. He didn't do that. Rather he incorporated this argument into a "Motion to Dismiss" so that he could further delay having to answer discovery, an approach Applicant has been following ever since responses were due in May of 2014 to Opposer's first set of discovery requests.

Conclusion

There is no reasonable basis here for Applicant's Motion to Dismiss to be granted. In fact, this is a frivolous filing made strictly to delay Applicant having to respond to discovery. Applicant needs to be held to the same standards as would any applicant represented by counsel,

and this unjustified motion should be denied and appropriate admonishments and/or sanctions entered against Applicant.

Respectfully submitted,

LeMans Corporation

Date: July 13, 2015 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONSE TO APPLICANT'S MOTION TO DISMISS was served via email on this 13th day of July, 2015 to Applicant at the following email address: lemarlewis@hotmail.com.

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J. Paul Williamson